

Boston College Environmental Affairs Law Review

Volume 38 | Issue 1

Article 4

4-1-2011

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Recommended Citation

Matthew F. Pawa, *The Very Definition of Folly: Saving the Earth from Environmentalists*, 38 B.C. Envtl. Aff. L. Rev. 77 (2011), <http://lawdigitalcommons.bc.edu/ealr/vol38/iss1/4>

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THE VERY DEFINITION OF FOLLY: SAVING THE EARTH FROM ENVIRONMENTALISTS

MATTHEW F. PAWA*

Abstract: Global heating is the greatest challenge of our time. While we know what is causing the global heating problem, and we know how to fix it, certain environmentalists pose a severe threat to the great hope of renewable energy that must be part of the solution to global heating. All across the United States those claiming to speak for the environment are filing legal actions against developers of solar and wind projects. They are using environmental laws, zoning laws, and anything else they can latch onto to fight renewable energy projects. This is the very definition of folly. We environmental lawyers have perfected the art of slowing down, burdening, and questioning to death developers. It was a great strategy for fighting the bad guys. But it is now presenting one of the biggest threats to the good guys, and to our environment. We now need to learn how to say “yes.”

INTRODUCTION

Global heating is the challenge of our time. And lawyers have a vital role to play in rising to the challenge. There are reasons for great hope that we can and will rise to meet this challenge. But due to an alarming new trend among some of those who consider themselves protectors of the environment, lawyers are needed now more than ever if we are to rise to this challenge.

What I have to say about some environmentalists threatening the planet will no doubt be considered controversial. Before we get there, however, I want to talk to you first about why I call it “global heating” and, second, about the legal battles over global heating that I have had the privilege to be involved in.

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This Article is adapted from the author’s Keynote Address at Boston College Law School’s Greenweek, March 15, 2010.

I. GLOBAL HEATING CASES

Why call it “global heating” and not the more commonly used “global warming” or “climate change”? I call it “global heating” because to be warm is nice. To be hot is not nice. The process of planetary cooking we are now experiencing is not nice, and so global heating is the more appropriate term. “Climate change” is technocratic and lacks verve; while it may be more accurate from a technical perspective, it fails to invoke any normative values and thus will never promote concern or action.

I have had the privilege to be involved in two major tort cases on the front lines of global heating. The first case is *Connecticut v. American Electric Power Co (AEP)*.¹ In *AEP*, a group of eight states, the City of New York, and three land trusts, whom I represent, filed suit in 2004 against five of the largest greenhouse gas (GHG) emitters in America.² The defendants are all electric utilities that burn large quantities of coal.³ Together these five companies are responsible for producing about twenty-five percent of all the United States electric power sector’s carbon dioxide emissions.⁴ We allege that these emissions are contributing to a massive public nuisance, namely, global heating.⁵ Our case sounds in the federal common law of public nuisance that applies to interstate pollution.⁶ We seek an injunction that would require these major GHG emitters to reduce their emissions over a period of years.⁷ Our causation theory is based upon the principle that each non de minimis contributor to a public nuisance is liable for having contributed to an indivisible harm.⁸

¹ 582 F.3d 309, *cert. granted*, 131 S. Ct. 813 (2010).

² *Am. Elec. Power Co.*, 406 F. Supp. 2d at 267–68, *vacated*, 582 F.3d 309, *cert. granted*, 131 S. Ct. 813 (2010); DOUGLAS G. COGAN, CERES, CORPORATE GOVERNANCE AND CLIMATE CHANGE: MAKING THE CONNECTION 76–85 (2003), *available at* <http://www.greenbiz.com/sites/default/files/document/CustomO16C45F42520.pdf>; Marianne Lavelle, *The 10 Biggest Carbon Dioxide Polluters*, U.S. NEWS & WORLD REPORT (Nov. 14, 2007), <http://money.usnews.com/money/business-economy/articles/2007/11/14/the-10-biggest-carbon-dioxide-polluters.html>.

³ *See Am. Elec. Power Co.*, 406 F. Supp. 2d at 268; COGAN, *supra* note 2.

⁴ *Am. Elec. Power Co.*, 406 F. Supp. 2d at 268; COGAN, *supra* note 2.

⁵ *Am. Elec. Power Co.*, 406 F. Supp. 2d at 268.

⁶ *See, e.g., Illinois v. City of Milwaukee (Milwaukee I)*, 406 U.S. 91, 104 (1972).

⁷ *Am. Elec. Power Co.*, 406 F. Supp. 2d at 270.

⁸ *See, e.g., Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 696–97 (7th Cir. 2008) (en banc).

Even if the amount of pollution caused by each party would be too slight to warrant a finding that any one of them had created a nuisance (the common law basis for treating pollution as a tort), “pollution of a stream to even a

The district court in *AEP* dismissed the case on the basis of the political question doctrine.⁹ We appealed and had oral argument in the Second Circuit in June of 2006, before a panel of three judges that included then Judge, now Justice, Sonia Sotomayor.¹⁰ In 2009, the two remaining judges on the panel reversed the district court's decision on the political question doctrine, and held that all plaintiffs have proper standing and had stated a proper claim under the federal common law of public nuisance.¹¹ The essence of the Second Circuit holding is that GHG emissions can be subjected to tort law causes of action just like other kinds of pollution.¹² On March 10, 2010, the Second Circuit denied the defendants' petition for rehearing en banc.¹³ The defendants appealed, and on December 6, 2010, the Supreme Court granted certiorari on the defendants' appeal.¹⁴ Stay tuned.

The second tort case is *Native Village of Kivalina v. ExxonMobil Corp.*¹⁵ In this case, a community of Inupiat Eskimos located in the Arctic Circle on the coast of Alaska sued twenty-four oil, energy, and utility companies.¹⁶ As in the *AEP* case, we allege that the defendants have contributed to global heating, and that global heating is a public nuisance under federal common law.¹⁷ But unlike *AEP*, in *Kivalina* we seek monetary damages.¹⁸ Specifically, we seek the hundreds of millions of dollars that are urgently needed to move the village out of harm's way.¹⁹

slight extent becomes unreasonable [and therefore a nuisance] when similar pollution by others makes the condition of the stream approach the danger point."

Id. (citation omitted); see also RESTATEMENT (SECOND) OF TORTS § 881 cmt. d (1979) ("It is also immaterial that the act of one of them by itself would not constitute a tort if the actor knows or should know of the contributing acts of the others.").

⁹ *Am. Elec. Power Co.*, 406 F. Supp. 2d at 274 (holding that this case presented non-justiciable political questions that are consigned to the political branches and not to the courts).

¹⁰ See *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 310 (2d Cir. 2009).

¹¹ *Id.* at 315.

¹² See *id.* at 366–69.

¹³ See Petition for Writ of Certiorari, *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009) (No. 10-174), 2010 WL 3054374, at *1 (noting denial of petition for rehearing); *2nd Circuit Denies Rehearing in Connecticut v. AEP Decision*, TROUTMAN SANDERS, <http://www.troutmansandersenergyreport.com/2010/03/2nd-circuit-denies-rehearing-in-connecticut-v-aep-decision/> (last visited Feb. 15, 2011).

¹⁴ *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 813 (2010).

¹⁵ 663 F. Supp. 2d 863 (N.D. Cal. 2009).

¹⁶ *Id.* at 868.

¹⁷ Compare *id.*, with *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 268 (S.D.N.Y. 2005).

¹⁸ *Kivalina*, 663 F. Supp. 2d at 868; *Am. Elec. Power Co.*, 406 F. Supp. 2d at 270.

¹⁹ *Kivalina*, 663 F. Supp. 2d at 869.

The village is being destroyed by global heating, which is melting the landfast sea ice that formerly protected the village from harsh fall and winter storms.²⁰ With the ice forming later, breaking up earlier, and becoming thinner and less extensive due to global heating, Kivalina is being battered to death by storms that are literally washing the village away.²¹ For a short period in December of 2009, there was no sea ice at Kivalina.²² The situation for the village has reached a crisis.

As in *AEP*, a federal judge in California dismissed our case on the basis of the political question doctrine, and on the alleged inability to establish the causal element of standing.²³ In so doing, the *Kivalina* trial court stated its express disagreement with the Second Circuit's ruling in *AEP*.²⁴ We have appealed and filed our briefs in the Ninth Circuit.²⁵ Again, stay tuned.

A final global heating case—or really a set of cases—I would like to share with you are the “Clean Car” cases.²⁶ Several years ago the automobile industry sued three states—California, Vermont, and Rhode Island—that had adopted a set of identical regulations limiting GHG emissions from motor vehicles.²⁷ Under the Federal Clean Air Act, California, which was regulating automobile emissions before the federal statute was enacted, is allowed to set more stringent auto emissions regulations, and other states may then adopt the stricter California standards.²⁸ That is exactly what has happened with GHG emissions; with California leading the way, over a dozen other states followed suit.²⁹ The car companies, led by General Motors and Chrysler, argued

²⁰ *Id.*

²¹ *Id.*

²² As reported to the author by co-counsel visiting the village in December 2009. *See also* Applied Physics Laboratory, Polar Science Center, *Arctic Sea Ice Volume Anomaly*, U. OF WASH., <http://psc.apl.washington.edu/ArcticSeaIceVolume/IceVolume.php> (showing graph depicting shrinking levels of Arctic sea ice over the years) (last visited Feb. 15, 2011).

²³ *Kivalina*, 663 F. Supp. 2d at 871–77, 881–82.

²⁴ *Id.* at 875.

²⁵ Appellants' Opening Brief, *Native Vill. of Kivalina v. ExxonMobil Corp.*, No. 09-17490 (9th Cir. Mar. 10, 2010), *available at* <http://www.pawalaw.com/assets/docs/kivalina-9th-circuit-appellants-brief.pdf>.

²⁶ *Lincoln-Dodge, Inc. v. Sullivan*, 588 F. Supp. 2d 224 (D.R.I. 2008); *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007); *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007).

²⁷ *See Lincoln-Dodge*, 588 F. Supp. 2d at 226; *Chrysler-Jeep*, 529 F. Supp. 2d at 1163; *Green Mountain*, 508 F. Supp. 2d at 301.

²⁸ *Lincoln-Dodge*, 588 F. Supp. 2d at 226; *Chrysler-Jeep*, 529 F. Supp. 2d at 1156.

²⁹ *See, e.g., Lincoln-Dodge*, 588 F. Supp. 2d at 226; *see also* Press Release, Environmental Defense Fund, 13 States Adopting California Clean Car Standards Would Reap Significant Economic and Environmental Benefits (June 30, 2009), *available at* <http://www.edf.org/>

that the state regulations are preempted by the federal fuel economy law.³⁰ I represented environmental groups that intervened on behalf of the states.³¹

I am pleased to tell you that we were victorious in all three of the Clean Car cases.³² In the Vermont case, the court held a bench trial in 2007 that resulted in a lengthy opinion upholding the state regulations.³³ The case is notable, among other reasons, for holding that the science of global heating meets the rigorous standards of admissibility for scientific evidence.³⁴ In fact, after hearing the testimony of our expert, Dr. James Hansen, the court concluded: “That global warming is taking place as a result of human emissions of carbon dioxide and other greenhouse gases, and that its consequences are likely to be harmful, is widely accepted in the scientific community.”³⁵ Additionally the court found, based on Dr. Hansen’s testimony, that it is not necessary to find that any single action to reduce emissions will solve the global heating problem in order for that action to be upheld as a meaningful step in the right direction towards addressing global heating.³⁶

Following this victory, the California federal court upheld California’s GHG regulations on summary judgment, and the Rhode Island federal court dismissed the automakers’ claims against Rhode Island on the basis of collateral estoppel.³⁷ In the California decision, Judge Anthony W. Ishii recognized the severity of the global heating problem and the urgent need to reduce emissions.³⁸ Judge Ishii stated that “[g]iven the level of impairment of human health and welfare that current climate science indicates may occur if human-generated greenhouse gas emissions continue unabated, it would be the very definition of folly” if government could not take action to reduce automobile

pressrelease.cfm?ContentID=10069 (reporting that thirteen states have followed California’s lead and adopted the Clean Car standards).

³⁰ *Lincoln-Dodge*, 588 F. Supp. 2d at 226; *Chrysler-Jeep*, 529 F. Supp. 2d at 1154; *Green Mountain*, 508 F. Supp. 2d at 301; AM. BAR ASS’N, GLOBAL CLIMATE CHANGE AND U.S. LAW 154 (Michael B. Gerrard ed., 2007).

³¹ *Chrysler-Jeep*, 529 F. Supp. 2d at 1153.

³² *Lincoln-Dodge*, 588 F. Supp. 2d at 237; *Chrysler-Jeep*, 529 F. Supp. 2d at 1190; *Green Mountain*, 508 F. Supp. 2d at 303.

³³ *Green Mountain*, 508 F. Supp. 2d at 399.

³⁴ *See id.* at 310–12.

³⁵ *Id.* at 341.

³⁶ *See id.* at 320 (“The fact that global warming will not be solved by changes in any one industry or by regulation of any one source of emissions in no way undercuts . . . the validity of partial responses; rather, it points to the necessity of responses, however incomplete when viewed individually.”).

³⁷ *Lincoln-Dodge*, 588 F. Supp. 2d at 226, 232; *Chrysler-Jeep*, 529 F. Supp. 2d at 1190.

³⁸ *Chrysler-Jeep*, 529 F. Supp. 2d at 1170.

greenhouse gas emissions “simply because the level of decrease in greenhouse gas output is incompatible with existing [federal] mileage standards.”³⁹ The “very definition of folly”—what incredibly wise words. I will come back to this phrase in a few minutes as it so perfectly describes the alarming new trend I mentioned at the beginning of this Article.

The automobile industry appealed all three of the Clean Car cases. But those appeals were dismissed as a result of a national settlement brokered by the White House, in which the state GHG standards will be codified in federal regulations issued jointly by EPA and the Department of Transportation.⁴⁰ The upshot is that the auto industry has surrendered: it lost not only its legal quest to strike down certain states’ GHG laws, but the challenged state regulations are now being extended to the entire nation.⁴¹ In the long run, the automobile industry will probably be grateful, since it is being forced to modernize.

These global heating cases that I have had the privilege to be involved in are part of a growing legal field—global heating law. In 2001, when I set out to practice what I now call global heating law, I sometimes wondered if perhaps I had lost my mind. After all, I was embarking on the practice of law in a field that did not exist. But over the last decade, global heating law has gone from a lark, to a smattering of cases, to a cottage industry, to a full-blown field of law. Global heating law is now taught at many law schools, including Boston College Law School,⁴² and practitioners can now be found at law firms in every major legal market in the country.⁴³

I am not just talking about tort law. As evidenced by the Clean Car cases, tort law is just one of many areas of the law that is being brought

³⁹ *Id.*

⁴⁰ Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (codified at 40 C.F.R. pts. 85, 86, 600, and 49 C.F.R. pts. 531, 533, 536–538).

⁴¹ Robin Bravender, *Obama Admin Publishes Greenhouse Gas Rule for Autos, Setting Timeline for Lawsuits*, GREENWIRE, May 10, 2010, available at <http://www.nytimes.com/gwire/2010/05/10/10/greenwire-obama-admin-publishes-greenhouse-gas-rule-for-22775.html>.

⁴² See e.g., *Environmental Law and Policy: New Frontiers—Global Warming, Course Description*, BOS. C. L. SCH., <http://www.bc.edu/crs/l1/course/11479012011s.shtml> (last updated Jun. 20, 2010); *Climate Change*, LEWIS & CLARK L. SCH., <http://legacy.lclark.edu/dept/lawreg/law490.html> (last visited Feb. 15, 2011).

⁴³ See generally Kevin T. Haroff, *The New Environmental Paradigm: Trends and Strategies for Responding to the Challenges of Climate Change*, in *THE LEGAL IMPACT OF CLIMATE CHANGE: LEADING LAWYERS ON NAVIGATING NEW LAWS, AVOIDING LIABILITY, AND ANTICIPATING FUTURE CHALLENGES FOR CLIENTS* 87, 87–110 (2010).

to bear on the problem.⁴⁴ The Columbia Law School Center for Climate Change Law—the existence of which is itself a testament to this burgeoning area of the law—has put together a chart to keep track of all the global heating cases.⁴⁵ Several years ago this chart was just a single page.⁴⁶ It is now two hundred and forty-six pages long.⁴⁷ For those of you who want to practice global heating law, this is good news.

In this unfolding story of global heating law, the particular virtue of tort law is that it can force the polluters to internalize the true costs of their pollution and thus level the playing field for competition with clean energy companies.⁴⁸ If a coal-burning power plant can park its carbon dioxide in our atmosphere free of charge, and without ever being held liable for the injuries that result, that puts solar and wind companies at a severe and unfair competitive disadvantage. Clean energy companies have shouldered the costs of avoiding GHG emissions in the production of energy, yet their dirty energy competitors are getting a free ride on our atmosphere.⁴⁹ Tort law can help internalize some of those costs.⁵⁰

⁴⁴ See generally David Markell & J.B. Ruhl, *An Empirical Study of Climate Change Litigation in the United States*, 40 ENVTL. L. REP. (Envtl. Law Inst.) 10,644, 10,644–45 (July 2010).

⁴⁵ Michael Gerrard & J. Cullen Howe, *Climate Change Litigation in the U.S.*, COLUMBIA L. SCH. CENTER FOR CLIMATE CHANGE L., <http://www.climatecasechart.com/> (last visited Feb. 15, 2011).

⁴⁶ See Climate Litigation: Filings, ARNOLD & PORTER LLP, <http://www.arnoldporter.com/resources/documents/climate%20temporal%20chart.pdf> (last updated Jan. 5, 2011).

⁴⁷ See Gerrard & Howe, *supra* note 45.

⁴⁸ See PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 80 (4th ed. 2010) (discussing the role of tort law in forcing internalization of costs).

⁴⁹ See *id.*; see also Robert H. Cutting & Lawrence B. Cahoon, *The “Gift” That Keeps On Giving: Global Warming Meets the Common Law*, 10 VT. J. ENVTL. L. 109, 113–14 (2008) (discussing cost savings by companies that avoid greenhouse gas reductions, and how this exacerbates the problem by providing them with an unfair competitive advantage).

⁵⁰ Cutting & Cahoon, *supra* note 49, at 124 (“[T]ransboundary pollution, such as GHG emissions, expose receptors, as ‘test subjects’ of the pollution, to long-term and short-term damages that are external social costs, or ‘externalities.’ This is a market failure because . . . those costs are borne by the receptors or the taxpayers (e.g. healthcare or cleanup costs).”); Cutting & Cahoon, *Thinking Outside the Box: Property Rights as a Key to Environmental Protection*, 22 PACE ENVTL. L. REV. 55, 65 (2005) (“[Environmental externalities] reflect the ability of one entity, e.g., a company, to use water or air as a free resource for waste disposal, while others pay the cost in contaminated air or water.”); James L. Huffman, *The Public Interest in Private Property Rights*, 50 OKLA. L. REV. 377, 380 n.11 (1997) (“When those costs are ‘externalized’ to third parties, there is a market failure in the sense that one of the assumed conditions of an efficient market is missing.”).

II. HOPE FOR THE FUTURE

I said earlier that there are reasons for great hope that we can meet the challenge of the global heating crisis. Two reasons in particular give me such hope. The first is our scientific understanding of the problem. We should be grateful that although technology in many ways created the global heating crisis, we have the technology and understanding to know with reasonable certainty what is happening to our planet.⁵¹ The worldwide scientific enterprise has revealed extraordinary insights into the causes, impacts, and risks of global warming. We know what is happening, we know why, and we know how to fix it if we care to do so.

How to fix the problem is what I really want to discuss. We have all the renewable energy we need to solve the global heating problem.⁵² A recent study in *Scientific American* spelled out a scenario for providing all the world's energy needs by 2030 from renewable sources: wind, water, geothermal, and solar power.⁵³ The plan includes large, utility-scale development of wind and solar farms.⁵⁴ Those of you like me, who love free rivers, will be glad to know that this plan calls for very few large, new hydropower plants.⁵⁵ And those who advocate for distributed generation will be glad to know that it also calls for a maximal use of small, rooftop solar installations.⁵⁶

The authors show that we have far more solar and wind resources available to us in harvestable places than we need to supply human energy needs.⁵⁷ There are forty to eighty-five terawatts of available wind power, and 580 terawatts of available solar power, compared to our current total energy needs of twelve and a half terawatts.⁵⁸ Yet our current generation from wind and solar is only 0.02 and 0.008 terawatts, respectively.⁵⁹

⁵¹ See, e.g. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SYNTHESIS REPORT (R.K. Pachauri & A. Reisinger eds., 2007), available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.

⁵² Mark Z. Jacobson & Mark A. Delucchi, *A Path to Sustainable Energy by 2030*, SCI. AM. 58, 58 (Nov. 2009).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See *id.* at 60 (stating that most suitable large reservoirs are already providing hydroelectric power).

⁵⁶ *Id.* (stating that another forty percent of power would come from photovoltaic sources, with about thirty percent of that output coming from rooftop panels on homes and commercial buildings).

⁵⁷ *Id.* at 56.

⁵⁸ Jacobson & Delucchi, *supra* note 52, at 60.

⁵⁹ *Id.*

The plan outlined in the *Scientific American* article includes 3.8 million wind turbines of five megawatts each.⁶⁰ The direct footprint of these wind turbines would occupy less than fifty square kilometers, an area smaller than the size of Manhattan.⁶¹ Even when the spacing between turbines is factored in, they would occupy less than one percent of Earth's surface and the area between such turbines would be usable for agriculture, open land, or water.⁶² The plan further calls for 49,000 concentrated solar power plants and 40,000 solar photovoltaic plants, which, again, would occupy a tiny fraction, 0.33 percent, of the Earth's surface.⁶³ While I do not suggest that this plan is perfect or that the authors have solved every wrinkle, their basic point is incontrovertible: by taking what we already know how to do, and reasonable estimates of expected technological progress, we could, if we so desired, massively ramp up renewable energy to a level that would largely, if not totally, replace fossil fuel generation.⁶⁴ And we could do so in a timeframe that would be consistent with scientific consensus about when we need to act to avoid dangerous global heating.⁶⁵

The alternative to building this massive renewable energy infrastructure is to build about 13,000 new coal-fired power plants.⁶⁶ Coal is not only the primary culprit in the global heating crisis, but building this many coal-fired plants, combined with the coal mining process itself, would take up far more land than the footprint of the proposed renewable plants.⁶⁷ And this is not to mention the role of coal in poisoning our air and water, nor the high toll on the health and well-being of the people who work in coal mines, who could be retrained for better jobs with brighter futures in clean, renewable energy.

This *Scientific American* article also examines the cost of building this massive renewable energy infrastructure, and finds it to be economically feasible.⁶⁸ While it costs ten times as much to build the renewable infrastructure as it would to build the 13,000 coal plants, the fuel is free—forever.⁶⁹ More importantly, the cost comparison of renewables versus

⁶⁰ *Id.* at 61.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Jacobson & Delucchi, *supra* note 52, at 61.

⁶⁵ *See id.* at 65 (estimating a full conversion to a clean energy system in forty to fifty years based on reasonably modest policies).

⁶⁶ *Id.* at 61.

⁶⁷ *Id.*

⁶⁸ *See id.* at 64.

⁶⁹ *See id.*

fossil fuels always ignores the costs of fossil fuel combustion and global heating. How much are all those premature deaths from air pollution worth? How much is it worth to have virtually all the lakes and streams in the Northeastern United States so poisoned with mercury from coal-fired power plants that you should not eat the fish?⁷⁰ How much is an eroded coastline worth?⁷¹ How much is New Orleans worth?⁷² The California mountain snowpack—a vital source of freshwater water for the largest state in the Union—will decline as a result of global heating; how much is that worth?⁷³ The World Health Organization says it is likely that 150,000 people already die every year from global heating; how much is that worth?⁷⁴ How much is it worth to have global heating displace a billion people?⁷⁵ How much is it worth that our massive emissions of GHGs threaten to take the Earth's climate over a dangerous tipping point—a point of rapid, non-linear climate change that would push the Earth into a climate unlike any we have ever experienced during human civilization?⁷⁶ How much, at long last, is a planet worth?

Conventional economics says the answer to all these questions is zero. The fossil fuel companies get all the profits, and the public and victims pay the costs. I hope now you are thinking back to what I said earlier about externalities. The cost comparisons almost always ignore the damages to human lives, health, and the environment from our reliance on fossil fuels.⁷⁷ Tort law plays an important but ultimately modest role in internalizing these costs. Only the most obvious victims who can prove clear causal chains for existing harms will ever recover damages, even in a well-developed tort system.⁷⁸

⁷⁰ See 145 CONG. REC. 5076–77 (1999).

⁷¹ See generally JAMES G. TITUS ET AL., U.S. CLIMATE CHANGE SCI. PROGRAM, COASTAL ELEVATIONS AND SENSITIVITY TO SEA-LEVEL RISE: A FOCUS ON THE MID-ATLANTIC REGION (2009) (discussing the impacts of sea-level rise on the coast).

⁷² See Jeffrey Kluger, *Is Global Warming Fueling Katrina?*, TIME (Aug. 29, 2005), <http://www.time.com/time/nation/article/0,8599,1099102,00.html>.

⁷³ See Don Thompson, *Global Warming to Impact California in 20 Years*, ASSOCIATED PRESS, Nov. 8, 2003, available at http://www.lakepowell.org/page_two/what_s_new/nov0803.htm.

⁷⁴ See Press Release, World Health Org., Climate Change is Bad for Your Health (Apr. 7, 2008), available at http://www.wpro.who.int/media_centre/press_releases/pr20080704.htm.

⁷⁵ See John Vidal, *International: Climate Change to Force Mass Migration*, GUARDIAN (London), May 14, 2007, at 16, available at <http://www.guardian.co.uk/environment/2007/may/14/climatechange.climatechangeenvironment>.

⁷⁶ See NAT'L ACAD. OF SCIS., ABRUPT CLIMATE CHANGE: INEVITABLE SURPRISES 14–15 (2002).

⁷⁷ See PLATER ET AL., *supra* note 48, at 27 n.1.

⁷⁸ See *id.* at 101–02.

III. THE VERY DEFINITION OF FOLLY

I have just said that I have hope, and that we all have reason to hope: we know what is causing the global heating problem, and we know how to fix it. Yet today, the reasons for hope are under attack. We all know about the cynical, industry-driven attacks on mainstream science. What I want to talk about now is another severe threat to the great hope of renewable energy.

What I am about to say will no doubt be viewed by many as provocative, divisive, and incendiary. But it must be said: the great hope of renewable energy is under severe threat from certain environmentalists.

Consider the following. A federal court halted a wind company's plans to build 122 wind turbines on a ridge in Appalachia because of concerns about the impact on an endangered species, the Indiana bat.⁷⁹ Similarly, in California, conservation groups are opposing a project that would create tens of thousands of concentrated solar power dishes in the Mojave Desert because of its potential impact on wildlife, including the desert tortoise and fringe-toed lizard.⁸⁰ This project would generate 850 megawatts of clean, renewable energy and help the state meet its ambitious goal of generating one-third of the state's electricity from renewables by 2020.⁸¹

The Forest Ecology Network, a forest conservation organization, is opposing a proposal to build forty-nine wind turbines on mountain tops in rural Maine.⁸² This group argues that wind turbines should be built offshore or in more heavily populated areas and not in the pristine Maine woods.⁸³ Yet this organization spends much of its time and efforts trying to raise awareness of the threat of global heating to the Maine woods.⁸⁴ Its members' magazine recently featured an image of

⁷⁹ Animal Welfare Inst. v. Beech Ridge Energy LLC, 675 F. Supp. 2d 540, 548, 580–81 (D. Md. 2009).

⁸⁰ See Todd Woody, *California Puts Tessera Solar Plant on Temp Hold*, REUTERS, Nov. 22, 2010, available at <http://www.reuters.com/article/2010/11/22/us-solar-california-idUSTRE6AL69T20101122>.

⁸¹ See *id.*

⁸² Jonathan Carter, *Mountaintop Industrial Wind Power Is Not "Green,"* ME. WOODS, Jan. 2010, at 28.

⁸³ *Id.*

⁸⁴ See *How Will Global Warming Affect Northern New England's Forests*, FOREST ECOLOGY NETWORK, http://www.forestecologynetwork.org/climate_change/effect_on_forests.html (last visited Feb. 15, 2011).

the Earth burning in a pot on a stovetop and asks, “Have we passed the tipping point?”⁸⁵

All across the United States those claiming to speak for the environment are filing legal actions against developers of solar and wind projects.⁸⁶ They are using environmental laws, zoning laws, and anything else they can latch onto to fight renewable energy projects.⁸⁷ To borrow Judge Isshi’s phrase, this is the very definition of folly.⁸⁸

I do not mean to suggest that all environmental groups or environmentalists are joining this ill-conceived movement to challenge renewable energy projects. That is far from the case. Many professionals in the field of environmental protection are taking stands in favor of renewable energy projects—even controversial ones—and have wisely noted that the production of energy always involves some kind of tradeoff. It is a minority of the environmental movement that is taking legal action against vital renewable energy projects, but a vocal and active minority that is armed with all the legal tools devised over many years to fight *harmful* industrial development.

There are so many of these challenges that the United States Chamber of Commerce has launched a media outreach project called “Project No Project”—a tracking system with an interactive map of the United States showing scores of renewable energy projects that are the subject of regulatory challenges.⁸⁹ This being the Chamber of Commerce, there is, I suspect, a lot of exaggeration behind Project No Project. And the Chamber’s interactive map of delayed projects depicts not only delayed renewable energy projects, but also delayed or cancelled coal-fired power plants, which the Chamber views as bad news, but which I would suggest is very good news.⁹⁰ Yet there is an impor-

⁸⁵ ME. WOODS, Jan. 2010, at 1, *available at* http://www.forestecologynetwork.org/pdf%20files/TMW_Jan_2010_hi.pdf.

⁸⁶ See Joanna Kakissis, *Debating the Merits of Energy From Air*, N.Y. TIMES, Nov. 25, 2007, at D6 (“[A]s the [wind] industry expands amid global pressure to cut carbon emissions and fight climate change, an increasingly mobilized anti-wind farm lobby in Europe, North America and elsewhere is decrying the turbines as ugly, noisy and destructive, especially for picturesque locales that rely on tourism.”).

⁸⁷ See, e.g., *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep’t of Army*, 398 F.3d 105 (1st Cir. 2005); *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 858 N.E.2d 294, 295 (Mass. 2006); *Town of Barnstable v. Cape Wind Assocs., LLC*, 27 Mass. L. Rptr. 111 (Mass. Super. 2010).

⁸⁸ *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1170 (E.D. Cal. 2007).

⁸⁹ Project No Project, *Energy—Back on Track*, U.S. CHAMBER OF COM., <http://pnp.uschamber.com/> (last visited Feb. 15, 2011).

⁹⁰ Project No Project, U.S. CHAMBER OF COM., <http://pnp.uschamber.com/noproject.pdf> (last visited Feb. 15, 2011).

tant kernel of truth in Project No Project. Environmental and zoning laws are being used to hold up vital renewable energy projects nationwide. Even where the opposition consists of little more than short-sighted NIMBY-ism,⁹¹ the opponents are now able to steal a page from the environmentalists' legal playbook.

The most extreme example of this alarming trend is right here in Massachusetts. I am referring to Cape Wind. The Cape Wind project proposes to erect 130 turbines in Nantucket Sound, which would produce three-quarters of the energy needs of the Cape and Islands.⁹² Cape Wind has passed every environmental review with flying colors.⁹³ It has been endorsed by the Massachusetts Audubon Society and Conservation Law Foundation.⁹⁴ The turbines would look so small from shore that if you hold out your hand at arm's length and point your thumb up, your thumb would block your view of a turbine.⁹⁵ Cape Wind is a vital project if Massachusetts is to achieve its goal of producing twenty percent of its energy from renewable sources by the year 2020.⁹⁶

As a lawyer representing the citizens group Clean Power Now, which advocates in favor of Cape Wind and other renewable energy projects, I can offer you some insights into the Cape Wind battle. The opponents of the project are predominantly a small group of extremely wealthy landowners who own lavish seaside properties, and who are concerned about their view and their yachting areas.⁹⁷ They have hired high-powered lawyers and waged a scorched-earth litigation campaign against Cape Wind. The organization that has led the charge goes by the name of the Alli-

⁹¹ NIMBY is an acronym for the phrase "not in my backyard." See Project No Project, *supra* note 89.

⁹² *Project at a Glance*, CAPE WIND, <http://www.capewind.org/article24.htm> (last visited Feb. 15, 2011).

⁹³ See *Cape Wind Fact Sheet*, BUREAU OF OCEAN ENERGY MGMT., REG. AND ENFORCEMENT, <http://www.boemre.gov/offshore/renewableenergy/PDFs/CapeWindFactSheet10-14-2010.pdf> (last visited Feb. 15, 2011).

⁹⁴ See Sue Reed, *Cape Wind Gathers Steam*, CONSERVATION LAW FOUND. (Nov. 23, 2010), <http://www.clf.org/blog/clean-energy-climate-change/cape-wind-gathers-steam/>; Press Release, Mass. Audubon Soc'y, Mass Audubon Supports Cape Wind Energy Project (Jun. 25, 2010), available at <http://www.massaudubon.org/news/index.php?id=1482&type=press>.

⁹⁵ See Mike Seccombe, *A Green Light for Cape Wind*, VINEYARD GAZETTE, Jan. 23, 2009, at 1, available at <http://www.mvgazette.com/article.php?19794>.

⁹⁶ See Press Release, Office of the Governor, Governor Patrick Sets New Goals for Wind Power (Jan. 13, 2009), available at http://www.mass.gov/?pageID=gov3pressrelease&L=1&L0=Home&sid=Agov3&b=pressrelease&f=090113_Goals_Wind_Power&csid=Agov3.

⁹⁷ See Tim Doyle, *Koch's New Fight*, FORBES (Sept. 21, 2006, 6:00 PM), http://www.forbes.com/2006/09/21/koch-gordon-nantucket-biz_cz_td_06rich400_0921nantucket.html (discussing billionaire energy mogul William I. Koch's opposition to Cape Wind to protect his yachting experience in Nantucket Sound).

ance to Protect Nantucket Sound.⁹⁸ A major funder of this campaign has been none other than coal, oil, and gas magnate William Koch.⁹⁹ The Alliance to Protect Nantucket Sound is joined in this campaign by town officials from Cape Cod who have narrow, parochial concerns, and who are determined to stop the project at all costs.¹⁰⁰

The Alliance to Protect Nantucket Sound and Cape Cod towns have filed countless legal challenges against Cape Wind.¹⁰¹ They have filed cases in Barnstable Superior Court, with state administrative agencies, and in federal court.¹⁰² So far they have lost every single one of the numerous cases they have filed, most of which border on, if not cross right into, the frivolous.¹⁰³ But the result nonetheless has been an arduous and decade-long permitting process for this vital renewable energy project.¹⁰⁴

One area of legal challenge to Cape Wind has been the permitting of the transmission line. The transmission line is, in essence, a long extension cord that will connect Cape Wind to the grid.¹⁰⁵ While the wind farm itself is located in federal waters, and thus beyond state jurisdiction, the transmission line crosses over state waters and onto land within the state, thus giving Massachusetts permitting authority over the line.¹⁰⁶ The process has been lengthy and redundant. The State's Energy Facilities Siting Board (EFSB) issued a permit in 2005, which was

⁹⁸ See *About Us*, ALLIANCE TO PROTECT NANTUCKET SOUND, https://org2.democracynation.org/o/6891/content_item/aboutus (last visited Feb. 15, 2011).

⁹⁹ Doyle, *supra* note 97 (stating that Koch and his counterparts have provided ninety percent of the funding for the Alliance to Protect Nantucket Sound).

¹⁰⁰ See *Stakeholders*, ALLIANCE TO PROTECT NANTUCKET SOUND, http://org2.democracynation.org/o/6891/content_item/stakeholders (last visited Feb. 15, 2011) (demonstrating that the Cape Cod Chamber of Commerce is a stakeholder in the organization).

¹⁰¹ See, e.g., *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army*, 398 F.3d 105 (1st Cir. 2005); *Town of Barnstable v. Cape Wind Assocs., LLC*, 27 Mass. L. Rptr. 111 (Mass. Super. 2010); see also *Alliance to Protect Nantucket Sound*, www.saveoursound.org (last visited Feb. 15, 2011) (listing appeals filed by Alliance to Protect Nantucket Sound and stakeholders).

¹⁰² See *Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of Army*, 288 F. Supp. 2d 64, 66–67 (D. Mass. 2003); *Cape Wind Assoc.*, 27 Mass. L. Rptr. 111 at *1.

¹⁰³ See Michael C. Bailey, *Alliance to Protect Nantucket Sound Files Suit Against State*, ENTERPRISE, (Nov. 5, 2010), <http://www.capenews.net/communities/region/news/621> ("The opposition group is fond of litigation but they have not enjoyed much success with it," he said, noting, "their losing legal track record stands at zero for 15, and counting.") (quoting Mark Rodgers, director of communications for Cape Wind).

¹⁰⁴ Press Release, Cape Wind, Cape Wind Completes Permitting Process (Jan. 7, 2011), available at <http://www.capewind.org/news1174.htm>.

¹⁰⁵ *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd. (Alliance I)*, 858 N.E.2d 294, 295 (Mass. 2006).

¹⁰⁶ *Id.*

upheld by the Massachusetts Supreme Judicial Court in 2006.¹⁰⁷ But the Cape Cod Commission, a local permitting agency, succumbed to parochial concerns and denied Cape Wind's application.¹⁰⁸ This was rank hypocrisy since the Commission had recently approved an even longer transmission line across Nantucket Sound without raising the slightest concern.¹⁰⁹

Cape Wind sought review of the Commission's decision from the State EFSB.¹¹⁰ I am pleased to tell you that the Board issued a statewide composite permit for the transmission line that not only reverses the Cape Cod Commission's decision, but constitutes a unified state authorization under all state and local laws.¹¹¹ Opponents again decided to draw out the process and filed an appeal to the Supreme Judicial Court. However, on August 31, 2010, the Supreme Judicial Court decided in favor of Cape Wind, and thus the state permit battles are now over once and for all.¹¹² Although the transmission line issues are resolved in favor of Cape Wind, it was still a long and expensive path to finally resolve all of the opposition's challenges.

Another area of legal challenge to Cape Wind has been the federal final environmental impact statement (EIS) review. The Department of the Interior issued an EIS in 2009 that demonstrates the benign nature of the project;¹¹³ and issued a federal lease to Cape Wind on October 6, 2010.¹¹⁴ On June 25, 2010, Cape Wind opponents filed suit against the Department of Interior, alleging violations of the Endangered Species

¹⁰⁷ *Id.* at 295, 298.

¹⁰⁸ *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd. (Alliance II)*, 932 N.E.2d 787, 791 (Mass. 2010).

¹⁰⁹ See Letter from Margo Fenn, Exec. Dir. Cape Cod Comm'n, to Ellen Roy Herzfelder, Sec'y of Env'l Affairs (Feb. 6, 2004) (on file with author) (recommending that the Secretary not require an Environmental Impact Report for the Nantucket cable project); *Nantucket Cable Project*, Nat'l Grid, http://www.nationalgridus.com/nantucket/about_us/cable.asp (last visited Feb. 15, 2011).

¹¹⁰ *Alliance II*, 932 N.E.2d at 791.

¹¹¹ See *id.*

¹¹² *Id.* at 814–15; Beth Daley, *SJC Decision Gives Cape Wind Project Green Light to Build*, BOS. GLOBE, Sept. 1, 2010, at B1, available at http://www.boston.com/lifestyle/green/articles/2010/09/01/sjc_ruling_gives_cape_wind_project_green_light_to_build/.

¹¹³ See BUREAU OF OCEAN ENERGY MGMT., REG. AND ENFORCEMENT, CAPE WIND FINAL ENVIRONMENTAL IMPACT STATEMENT E-1 (2009), available at <http://www.boemre.gov/offshore/RenewableEnergy/CapeWindFEIS.htm>.

¹¹⁴ BUREAU OF OCEAN ENERGY MGMT., REG. AND ENFORCEMENT, COMMERCIAL LEASE FOR CAPE WIND PROJECT (2010), available at [http://www.boemre.gov/offshore/renewable energy/PDFs/CapeWind_signed_lease.pdf](http://www.boemre.gov/offshore/renewable_energy/PDFs/CapeWind_signed_lease.pdf).

Act due to trivial impacts on birds.¹¹⁵ By their own account, the project will kill eighty to 100 Roseate Terns and up to ten Piping Plovers *over a period of twenty years*.¹¹⁶ The plaintiffs in this short-sighted legal challenge include the coal-money-funded Alliance to Protect Nantucket Sound, the Lower Laguna Madre Foundation—which is a Texas conservation group dedicated to preserving a bay in Texas¹¹⁷—and Californians for Renewable Energy,¹¹⁸ which opposes new fossil fuel power plants in California, and advocates *in favor* of renewable energy, but for reasons unknown opposes this renewable energy project located thousands of miles away from California.¹¹⁹

I have seen Piping Plovers myself on Cape Cod.¹²⁰ They are beautiful and make a wonderful little peep. They nest really close to the sea¹²¹—the sea that is precipitously rising due to global heating. We must save them if we can. Their coastal nesting areas are doomed if we do not fight the global heating fight with everything we have got.¹²² Are the opponents thinking about any of this, about the long-term survival of all the animals they are supposedly advocating for, or are they only concerned about their views and yachting grounds?

Cape Wind would constitute one of the single largest supply side reductions in GHGs ever accomplished in America.¹²³ It would be our first vital step towards catching up to the Europeans and the Chinese on alternative energy. It would help get us off foreign oil. The future of American leadership and credibility worldwide on the issue of global heating is at stake.

And yet the whole ten-year enterprise of Cape Wind could potentially be set back, and possibly suffer its final blow, from this lawsuit. However, there will not be any tidelands to support these species of

¹¹⁵ Complaint at 1, Public Employees for Environmental Responsibility et al. v. Bromwich et al., No. 1:10CV01067, (D.D.C. Jun. 25, 2010), *available at* <http://www.marinelog.com/PDF/capewindcomplaint.pdf>.

¹¹⁶ *Id.* at 25.

¹¹⁷ LOWER LAGUNA MADRE FOUND.: SOUTH TEXAS CONSERVATION AND PRESERVATION, www.lowerlagunamadrefoundation.com (last visited Feb. 15, 2011).

¹¹⁸ CALIFORNIANS FOR RENEWABLE ENERGY, www.calfree.com/aboutus.html (last visited Jan. 15, 2011).

¹¹⁹ See Complaint, *supra* note 115, at 1.

¹²⁰ See generally *The Piping Plover*, NAT'L PARK SERV., <http://www.nps.gov/caco/nature-science/the-piping-plover.htm> (last visited Feb. 15, 2010).

¹²¹ *Id.*

¹²² *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007).

¹²³ Graham Jesmer, *US Offshore Wind Project Updates*, RENEWABLEENERGYWORLD.COM, (Dec. 16, 2009), <http://www.renewableenergyworld.com/rea/news/article/2009/12/us-may-see-offshore-wind-project-in-water-by-2012>.

birds if we do not license Cape Wind and other renewable energy projects on a vast scale, and with a palpable sense of urgency. We environmental lawyers have perfected the art of slowing down, burdening, and questioning developers to death. The environmental movement can say “no” like nobody’s business. It was a great strategy for fighting the bad guys. But it is now presenting one of the biggest threats to the good guys, and to our environment. We now need to learn how to say “yes.”

Sure, some renewable energy projects have been proposed for the wrong places. But let us be clear that, given the climate crisis, the wrong places are very few and far between. I yield to no one in my love for natural places, intact ecosystems, and wildlife. But like the Massachusetts tidelands, there will be no natural places, no intact ecosystems, and no wildlife, or not very many of those things anyway, if we do not rise to the challenge of global heating.

The tools we developed over the past half century to battle polluters and land wreckers are now being used against the environment.

This is a call to arms. Do you want a career saving Mother Earth? You got it. Go work for the renewable energy industry. You can be their in-house counsel. Or your law firm can help them fight the legal challenges from the NIMBYists, the parochial interests, the narrow-minded, me-first view-shed protectors, the zoning laws, the mind-numbing array of environmental permit challenges, the artificial turfing, the fossil-fuel-funded front groups, and the sincere-but-misguided conservationists. You will make a darn good living. And you will be doing God’s work. Go for it. This is your generation’s challenge. This is your time. This is your call to arms.

